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Plaintiff Terrence Ferguson

THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Terrence Ferguson, an
individual, aka 2 Milly,

Plaintiff,

v.

Epic Games, Inc., a North
Carolina corporation; and
Does 1 through 50, inclusive,

Defendants.

Case No. 2:18-cv-10110-AS

First Amended Complaint

- 1. Direct Infringement of Copyright;**
- 2. Contributory Infringement of Copyright;**
- 3. Violation of the Right of Publicity under California Common Law;**
- 4. Violation of the Right of Publicity under Cal. Civ. Code § 3344;**
- 5. Unfair Competition under Cal. Bus. & Prof. Code § 17200, et seq.**
- 6. Unfair Competition under 15 U.S.C. § 1125(a)**

Demand for Jury Trial

1 Plaintiff Terrence Ferguson, aka 2 Milly, (“Plaintiff” or “Ferguson”),
2 by and through his undersigned counsel, asserts the following claims
3 against Defendant Epic Games, Inc. (“Epic”) and Does 1 through 50
4 (collectively referred to as “Defendants”), and alleges as follows:

5 I. OVERVIEW

6 1. Through its unauthorized misappropriation of Ferguson’s
7 highly popular signature dance, the “Milly Rock,” in its smash-hit,
8 violent video game, Fortnite Battle Royale (“Fortnite”), Epic has
9 unfairly profited from exploiting Ferguson’s protected creative
10 expression, likeness and celebrity, and trademark without his consent
11 or authorization.

12 2. Ferguson, also known by the alter ego and stage name, “2
13 Milly,” is a professional rapper, who created the self-named Milly Rock
14 dance, which exploded in popularity following Ferguson’s 2014 release
15 of his hit song, also titled, “Milly Rock,” and its accompanying music
16 video that demonstrates the dance. The Milly Rock is now inextricably
17 linked to Ferguson and has continued to be a part of his celebrity
18 persona.

19 3. Defendants capitalized on Ferguson’s celebrity and the Milly
20 Rock’s popularity, particularly with its younger fans, by selling the
21 Milly Rock as an in-game purchase in Fortnite under the name “Swipe
22 It,” which players can buy to customize their avatars for use in the
23 game. Although misleadingly labeled in Fortnite, the dance was
24 immediately recognized by players and media worldwide as the Milly
25 Rock. Epic did not seek, much less obtain, Ferguson’s consent to use,
26 display, reproduce, sell, or create a derivative work based upon
27 Ferguson’s Milly Rock dance or his likeness.

1 4. Since being released in or around September 2017, Fortnite
2 has become among the most popular video games ever with sales far in
3 excess of \$1 billion. Indeed, Fortnite made approximately \$318 million
4 in May 2018 alone, the “biggest month ever for a video game.” As a free-
5 to-play game, Fortnite derives its sales through in-game purchases.
6 Epic cannot profit from Ferguson’s hard-earned fame by its intentional
7 misappropriation of Ferguson’s original content or likeness. Epic
8 cannot increase the value of its main product by faking endorsements
9 by celebrities. Ferguson seeks injunctive relief and damages, including,
10 but not limited to, Epic’s profits attributed to its misappropriation of
11 the Milly Rock and Ferguson’s likeness.

12 II. THE PARTIES

13 5. Ferguson resides in Brooklyn, New York. He is better
14 known as the popular rapper, 2 Milly.

15 6. Epic is a North Carolina business corporation with its
16 principal place of business at 620 Crossroads Boulevard, Cary, NC
17 27518. Epic is the creator and developer of the Fortnite video game
18 franchise, which was first released in July 2017.

19 7. The true names and identities of the defendants herein sued
20 as Does 1 through 50, inclusive, are unknown to Ferguson, who
21 therefore sues those defendants by such fictitious names. When the
22 true names of those defendants have been ascertained, Ferguson will
23 amend this complaint accordingly. Each of the defendants aided and
24 abetted and is responsible in some manner for the occurrences herein
25 alleged, and Ferguson’s injuries were proximately caused thereby.

26 8. At all times herein mentioned, each of the defendants was
27 acting as an agent, servant, employee or representative of defendants,
28 and, in doing the things alleged in this Complaint, was acting within

1 the course and scope of that agency, service, employment, or joint
2 venture.

3 **III. SUBJECT MATTER JURISDICTION AND** 4 **VENUE**

5 9. The Court has subject matter jurisdiction over this action
6 pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1332
7 (diversity), and 28 U.S.C. § 1367 (supplemental jurisdiction).

8 10. Venue is proper in this District under A) 28 U.S.C. §
9 1391(b)(2) (federal question jurisdiction), because a substantial part of
10 the events or omissions giving rise to the claim occurred in this District;
11 and B) 28 U.S.C. §§ 1391(b)(1) and (c) (personal jurisdiction), because
12 all defendants are subject to personal jurisdiction in this State and at
13 least one in this District.

14 **IV. FACTUAL BACKGROUND**

15 **A. 2 Milly and the Creation of the Milly Rock**

16 11. Raised in the New York City borough of Brooklyn, Ferguson
17 has been rapping with his childhood friends since he was 13 years old
18 under the name “2 Milly.” Ferguson’s music focuses on his life as a
19 rapper growing up in a rough, predominantly African-American
20 Brooklyn neighborhood, and emphasizes his unique style and
21 perspectives.

22 12. In 2011, four years before releasing the “Milly Rock” single,
23 Ferguson created a dance, which he later named the Milly Rock after
24 himself, while listening and dancing to music with his friends. The
25 dance is distinctive and immediately recognizable.

26 13. Since creating the dance, Ferguson incorporated it into his
27 performances around New York City. Ferguson also posted videos of
28 himself and his friends, who later formed the rap group, Stack Paper,

1 performing the dance on YouTube and other social media platforms
2 including Instagram and Facebook.

3 14. In August 2014, Ferguson released “Milly Rock,” a rap that
4 celebrates the dance he created years ago. The song was accompanied
5 by a music video posted on YouTube, where Ferguson is depicted
6 performing the dance that he named after his stage name, 2 Milly, with
7 his friends in his hometown of Brooklyn. The hook of the song features
8 Ferguson, as 2 Milly, rapping the lyric, “I Milly Rock on any block.” The
9 Milly Rock song made the iTunes top 200 chart in its first week and was
10 the most added single on urban radio.

11 15. The song exploded in popularity the following summer as
12 various celebrities, including Rihanna, Chris Brown, and Wiz Khalifa
13 posted themselves performing the dance on social media. By the end of
14 the 2015 summer, the Milly Rock music video had over one million
15 views on YouTube and thousands of people began posting their own
16 videos showing themselves performing the Milly Rock. The video now
17 has more than 18 million views on YouTube. The video can be found at
18 <https://www.youtube.com/watch?v=PMzDoFuVgRg>.

19 16. Since its release in 2014 and its rise to fame in 2015, the
20 Milly Rock song and dance maintained its popularity. Ferguson
21 continues to successfully use the Milly Rock commercially. Ferguson
22 performs the Milly Rock song and dance at concerts, events and
23 festivals. Indeed, in 2015, the recording artist, Jacques Webster II, also
24 known as Travis Scott, performed the Milly Rock, alongside Ferguson,
25 at the popular Summer Jam Festival. Moreover, other artists have
26 sought and been granted licenses from Ferguson in exchange for
27 compensation to perform the Milly Rock in their concerts and
28 performances.

1 17. The Milly Rock has become synonymous with Ferguson, who
2 is unanimously credited with creating the dance that bears his stage
3 name, and who performs the Milly Rock song and dance at every
4 performance. Ferguson has also been interviewed several times about
5 the creation of the Milly Rock and how to properly perform it.
6 Accordingly, the Milly Rock is a part of Ferguson's identity and the
7 dance's unique movements readily evoke imagery of Ferguson's Milly
8 Rock music video.

9 **B. Fortnite: The Most Popular Video Game Ever**

10 18. Even prior to releasing Fortnite, which would become among
11 the most popular and successful video games ever, Epic had already
12 developed two popular video game franchises: Unreal and Gears of
13 War. Since releasing the first Gears of War game in 2006, Epic released
14 several subsequent Gears of War video games, and the franchise has
15 made has made over \$1 billion in total sales.

16 19. In or around 2011, following the release of the third Gears
17 of War installment, Fortnite began from an Epic internal video game
18 "hackathon," a gathering of Epic developers to brainstorm ideas and
19 create games in a short period. Although the Fortnite game was not
20 developed during the hackathon, the idea to merge building games (*i.e.*,
21 Minecraft) and shooter games (*i.e.*, Gears of War or Call of Duty)
22 emerged during the hackathon.

23 20. In or around July 2017, Epic released the initial version of
24 Fortnite as a paid early-access video game. However, by September
25 2017, after PlayerUnknown's Battlegrounds—a game which occupied
26 the same "battle royale" genre as Fortnite—became a worldwide
27 success, Epic released Fortnite Battle Royale, a free-to-play battle
28 royale third person shooting game on the Windows, macOS, PlayStation

1 4 and Xbox One platforms. Epic subsequently released Fortnite on the
2 iOS, Nintendo and Android platforms on April 2, 2018, June 12, 2018,
3 and August 9, 2018, respectively.

4 21. Similar to PlayerUnknown's Battlegrounds, Fortnite
5 utilizes the battle royale format where up to 100 players, alone, in pairs,
6 or groups, compete to be the last player or group alive. Indeed, similar
7 to Battlegrounds and Gears of War, Fortnite features the use of
8 weapons and violence, that players use to eliminate the competition by
9 attacking and shooting them.

10 22. As a free-to-play video game, Epic allows players to
11 download and play Fortnite for free. Fortnite is supported by in-game
12 transactions where players can purchase virtual currency, called
13 "Vinderbucks" or "V-Bucks." The players in turn use V-Bucks to
14 purchase customizations for their in-game avatars, including new
15 characters, pickaxe modifications, glider skins, clothes, and emotes
16 (dances or movements). Fortnite also sells "Battle Passes" or additional
17 levels that allow you to unlock skins, gliders, and emotes unique to that
18 Pass. Fortnite offers four pricing levels for purchasing V-Bucks:

- 19 1) 1,000 V-Bucks for \$9.99;
20 2) 2,500 (+300 Bonus) V-Bucks for \$24.99;
21 3) 6,000 (+1,500 Bonus) V-Bucks for \$59.99; or
22 4) 10,000 (+3,500 Bonus) V-Bucks for \$99.99.

23 23. There are four types of emotes: common emotes, uncommon
24 emotes, rare emotes, and epic emotes. The rarer the emote, the more
25 expensive or harder it is to obtain. Uncommon emotes cost 200 V-
26 Bucks. Rare emotes cost 500 V-Bucks. And Epic emotes cost 800 V-
27 Bucks.

1 24. To start, Fortnite provides each player with the Dance
2 Moves emote, a common emote, for no compensation. Players can then
3 obtain other emotes by purchasing and playing additional levels in
4 Battle Passes (950 V-Bucks each) that come with emotes unique to that
5 Pass, or by purchasing certain emotes directly with V-Bucks. On some
6 occasions, Fortnite sells Battle Pass emotes directly, without requiring
7 the player to purchase the Battle Pass.

8 25. Emotes are incredibly popular and are fundamental to
9 Fortnite's success. Players purchase emotes, alongside clothing and
10 skins, to personalize their Fortnite experience. Emotes have also
11 become popular outside Fortnite. Professional athletes in soccer and
12 other sports have based their celebrations on Fortnite emotes. Young
13 adults, teenagers, and kids also post videos of themselves on YouTube
14 and social media performing emotes under various hashtags, including
15 #fortnitedance or #fortnitevideos.

16 26. Upon information and belief, Epic creates emotes by copying
17 and coding dances and movements directly from popular videos, movies,
18 and television shows without consent. Epic does so by coding still
19 frames of the source material.

20 27. Epic has consistently sought to exploit African-American
21 talent in particular in Fortnite by copying their dances and movements.
22 Epic has copied the dances and movements of numerous African-
23 American performers, including, for example, the dance from the 2004
24 Snoop Dogg music video, "Drop It Like It's Hot" (named the "Tidy"
25 emote), Alfonso Ribeiro's performance of his famous "Carlton" dance
26 (named the "Fresh" emote), the dance performed by Will Smith on the
27 same television show (named the "Rambunctious" emote), the dance in
28 Marlon Webb's popular "Band of the Bold" video (named the "Best

1 Mates” emote), Donald Faison’s signature dance seen on the NBC
2 television show Scrubs (named the “Dance Moves” emote), and, most
3 pertinent here, Terrence Ferguson’s Milly Rock dance. Upon
4 information and belief, Epic did not seek consent or authorization to use
5 any of these movements or dances.

6 28. Soon after its release, Fortnite became an international
7 phenomenon. The game eclipsed 10 million players merely two weeks
8 after its release; 125 million players by July 2018. In November 2018,
9 Bloomberg announced that Fortnite had 200 million player accounts
10 across all platforms.

11 29. Fortnite’s popularity has translated into record sales for
12 Epic. Analysts have estimated that since its release, Fortnite has
13 generated between \$1 billion to \$2 billion in revenue through in-game
14 purchases such as emotes. In May 2018, Fortnite broke its own record
15 by generating approximately \$318 million in revenue, the biggest
16 month ever for a video game. In fact, nearly 80 million people played
17 Fortnite in August 2018. Because of Fortnite’s success, Epic’s estimated
18 valuation rose from about \$825 million to about \$5 billion. Bloomberg
19 estimates that Epic’s valuation could grow to \$8.5 billion by 2018’s end.

20 30. Upon information and belief, Epic will likely continue
21 adding popular emotes to Fortnite without the artists’ or creators’
22 consent or approval to attract more players and add to its ever-growing
23 revenue.

24 **C. Fortnite’s Unauthorized Use of the Milly Rock**

25 31. On July 12, 2018, Fortnite released its Season 5 Battle Pass.
26 Players could purchase the Battle Pass, alongside its accompanying
27 emotes and other customizations, for the regular price of 950 V-Bucks.
28 As part of the Season 5 Pass, Fortnite offered a new rare emote that it

1 called “Swipe It.” According to Fortnite, players can obtain the Swipe
2 It emote as a reward from Tier 63 of the Season 5 Battle Pass. Also, on
3 certain occasions, Fortnite sold the Swipe It emote separately for 500
4 V-Bucks.

5 32. The “Swipe It” emote is identical to Ferguson’s Milly Rock
6 dance. If obtained or purchased, the Fortnite player’s avatar can
7 perform the dance during Fortnite gameplay. The reaction from many
8 players worldwide was immediate recognition of the emote as
9 embodying the “Milly Rock” while others likely believed it was Epic’s
10 original creation.

11 33. Upon information and belief, Epic intentionally developed
12 the Swipe It emote to intentionally mimic Ferguson performing the
13 Milly Rock. In fact, players had asked for it by name in various online
14 forums relating to Fortnite.

15 34. Epic did not seek to obtain Ferguson’s authorization or
16 consent for its use of his likeness and the Milly Rock for the Swipe It
17 emote.

18 35. Moreover, Ferguson did not give Epic express or implied
19 consent for its use of his likeness and the Milly Rock for the Swipe It
20 emote. Epic also did not compensate Ferguson for its use of his likeness
21 and the Milly Rock for the Swipe It emote.

22 36. Upon information and belief, Epic added the Swipe It emote
23 to intentionally exploit the popularity of Ferguson, Ferguson’s Milly
24 Rock song, and the Milly Rock dance without providing Ferguson any
25 form of compensation.

26 37. Epic profited from its improper misappropriation of the
27 Milly Rock and Ferguson’s likeness by, *inter alia*: 1) selling the
28 infringing Swipe It emote directly to players; 2) selling the Season 5

1 Battle Pass that contains the Swipe It emote; 3) advertising the Swipe
2 It emote to attract additional players, including 2 Milly's fans or those
3 persons familiar with the Milly Rock to play Fortnite and make in-game
4 purchases; 4) staying relevant to its current players to incentivize those
5 players to continue playing Fortnite; 5) impliedly representing that
6 Ferguson consented to Epic's use of his likeness; 6) erroneously cause
7 the association of the Swipe It with the Milly Rock; 7) creating the false
8 impression that 2 Milly endorsed Fortnite; and 8) inducing and/or
9 contributing to Fortnite players' avatars performing the Milly Rock
10 dance.

11 38. Upon information and belief, Epic uses the Milly Rock, and
12 other dances, to create the false impression that Epic started these
13 dances and crazes or that the artist who created them is endorsing the
14 game. Indeed, players have posted thousands of videos of themselves
15 performing the "Swipe It" emote with the hashtag, #fortnitedance,
16 without referencing the Milly Rock or crediting Ferguson as the dance's
17 creator and owner. Accordingly, upon information and belief, Epic
18 actively and knowingly directs, causes, induces, and encourages others,
19 including, but not limited to, its players, designers, suppliers,
20 distributors, resellers, software developers, and repair providers, to
21 misappropriate Ferguson's likeness and the Milly Rock dance.

22 39. Ferguson has stated in interviews that he does not consent
23 to or approve of Epic's use of his likeness and the Milly Rock for the
24 Swipe It emote. Other prominent artists, including Chancelor Bennett,
25 known as Chance the Rapper, have also publicly disapproved of Epic's
26 practices, and advocated for Epic sharing profits with the artists that
27 created these dances.
28

40. Accordingly, Epic made a fortune from unlawfully and unfairly misappropriating Ferguson's and other artists' creative expression and likeness without crediting or compensating these artists. Ferguson thus bring this lawsuit to prevent Fortnite from further using his likeness and the Milly Rock, and to recover the profits rightfully owed to him.

FIRST CAUSE OF ACTION

(For Direct Infringement of Copyright Against All Defendants)

41. Ferguson hereby repeats and realleges the allegations set forth in paragraphs 1 through 40, above, as though fully set forth herein.

42. On or around August 2014, Ferguson’s “Milly Rock” music video was published to YouTube where it can be accessed by millions of people. The Milly Rock music video shows Ferguson, as 2 Milly, rapping and performing the Milly Rock dance with his friends.

43. Ferguson is the undisputed creator of the wildly popular and immediately recognizable Milly Rock dance. Ferguson's videos are the original depictions of the Milly Rock dance.

44. Ferguson is in the process of registering the Milly Rock dance with the United States Copyright Office. On December 4, 2018, Ferguson submitted an application for copyright registration of the Milly Rock dance and assigned Copyright Office case number 1-7192939861.

45. Defendants have infringed and continue to infringe Ferguson’s copyrights in the Milly Rock by selling the Milly Rock dance emote as an in-game purchase, under the name “Swipe It” that, if purchased, a player can use to make his or her avatar perform during Fortnite gameplay; substantially copying the Milly Rock in digital form

1 to the Fortnite game; advertising the Milly Rock in its promotional
2 materials; and creating the Swipe It emote as a derivative work of the
3 Milly Rock.

4 46. Defendants did not seek to obtain Ferguson's permission for
5 its use of the Milly Rock for the Swipe It emote. Nor have Defendants
6 compensated or credited Ferguson for their use of the Milly Rock.

7 47. Moreover, Defendants actively and knowingly directed,
8 caused, induced, and encouraged others, including, but not limited to,
9 its players, designers, suppliers, distributors, resellers, software
10 developers, and repair providers, to misappropriate Ferguson's likeness
11 and the Milly Rock dance.

12 48. Defendants' acts of infringement have been willful,
13 intentional, and purposeful, in disregard of and with indifference to
14 Plaintiff's rights.

15 49. Defendants' willful and continued unauthorized use of the
16 Milly Rock for commercial gain has caused and will continue to cause
17 confusion and mistake by leading the public to erroneously associate
18 the Swipe It emote offered by Epic with the Milly Rock in violation of
19 17 U.S.C. §§ 101 et seq.

20 50. As a result of Defendants' conduct, Ferguson has been
21 damaged by being precluded from receiving his rightful share of the
22 profits earned by Epic for its improper and unlicensed use of Ferguson's
23 exclusive copyrights in the Milly Rock dance in Fortnite.

24 51. Ferguson is entitled to permanent injunctive relief
25 preventing Defendants, and their officers, agents, and employees, and
26 all related persons from further using the Milly Rock and engaging in
27 other acts in violation of Copyright law.

1 52. As a direct and proximate result of Defendants'
2 infringement of Plaintiff's copyrights and exclusive rights under
3 copyright, Ferguson is also entitled to recover damages, including
4 attorneys' fees, and any profits obtained by Defendants as a result of
5 the infringements alleged above, in an amount according to proof to be
6 determined at the time of trial.

7 53. In doing the acts herein alleged, Defendants acted
8 fraudulently, willfully, and with malice, and Ferguson is therefore
9 entitled to punitive damages according to proof at the time of trial.

10 **SECOND CAUSE OF ACTION**

11 **(For Contributory Infringement of Copyright Against All** 12 **Defendants)**

13 54. Ferguson hereby repeats and realleges the allegations set
14 forth in paragraphs 1 through 53, above, as though fully set forth
15 herein.

16 55. Ferguson is in the process of registering the Milly Rock
17 dance with the United States Copyright Office. On December 4, 2018,
18 Ferguson submitted an application for copyright registration of the
19 Milly Rock dance and assigned Copyright Office case number 1-
20 7192939861.

21 56. Defendants have infringed and continue to infringe
22 Ferguson's copyrights in the Milly Rock by selling the Milly Rock dance
23 emote as an in-game purchase, under the name "Swipe It" that, if
24 purchased, a player can use to make his or her avatar perform during
25 Fortnite gameplay; substantially copying the Milly Rock in digital form
26 to the Fortnite game; advertising the Milly Rock in its promotional
27 materials; and creating the Swipe It emote as a derivative work of the
28 Milly Rock.

1 57. By providing the Swipe It emote necessary for its players to
2 commit direct copyright infringement, Defendants has and continues to
3 materially contribute to the unauthorized reproductions and
4 distributions by its players of the Milly Rock.

5 58. Defendants did not seek to obtain Ferguson's permission for
6 its use of the Milly Rock for the Swipe It emote. Nor have Defendants
7 compensated or credited Ferguson for their use of the Milly Rock.

8 59. Moreover, Defendants actively and knowingly directed,
9 caused, induced, and encouraged others, including, but not limited to,
10 its players, designers, suppliers, distributors, resellers, software
11 developers, and repair providers, to misappropriate Ferguson's likeness
12 and the Milly Rock dance.

13 60. Defendants' acts of infringement have been willful,
14 intentional, and purposeful, in disregard of and with indifference to
15 Plaintiff's rights.

16 61. Defendants' willful and continued unauthorized use of the
17 Milly Rock for commercial gain has caused and will continue to cause
18 confusion and mistake by leading the public to erroneously associate
19 the Swipe It emote offered by Epic with the Milly Rock in violation of
20 17 U.S.C. §§ 101 et seq.

21 62. As a result of Defendants' conduct, Ferguson has been
22 damaged by being precluded from receiving his rightful share of the
23 profits earned by Epic for its improper and unlicensed use of Ferguson's
24 exclusive copyrights in the Milly Rock dance in Fortnite.

25 63. Defendants' conduct is causing and, unless enjoined and
26 restrained by this Court, will continue to cause Plaintiff great and
27 irreparable injury that cannot be compensated or measured in money.
28 Plaintiff has no adequate remedy at law. Pursuant to 17 U.S.C. § 502,

1 Plaintiff is entitled to injunctive relief, prohibiting further contributory
2 infringements of Plaintiff's copyrights.

3 64. As a direct and proximate result of Defendants'
4 infringement of Plaintiff's copyrights and exclusive rights under
5 copyright, Ferguson is also entitled to recover damages, including
6 attorneys' fees, and any profits obtained by Defendants as a result of
7 the infringements alleged above, in an amount according to proof to be
8 determined at the time of trial.

9 65. In doing the acts herein alleged, Defendants acted
10 fraudulently, willfully, and with malice, and Ferguson is therefore
11 entitled to punitive damages according to proof at the time of trial.

12 **THIRD CAUSE OF ACTION**

13 **(For Violation of the Right of Publicity Under California** 14 **Common Law Against All Defendants)**

15 66. Ferguson hereby repeats and realleges the allegations set
16 forth in paragraphs 1 through 65, above, as though fully set forth
17 herein.

18 67. Through their use of Milly Rock dance as an in-game dance
19 emote that can be purchased, Defendants misappropriated Ferguson's
20 identity. The Swipe it emote depicts Ferguson performing the Milly
21 Rock dance. Upon information and belief, Defendants created the
22 Swipe It emote by capturing and digitally copying Ferguson performing
23 the Milly Rock. Defendants then utilized the digital copy to create code
24 that, if purchased, allows player avatars to perform the Milly Rock
25 dance.

26 68. Defendants did not seek or obtain Ferguson's authorization
27 or consent for its use of his likeness for the Swipe It emote. Nor have
28

1 Defendants compensated or credited Ferguson for their use of the Milly
2 Rock.

3 69. Defendants used Ferguson's likeness to generate significant
4 wealth by: 1) selling the infringing Swipe It emote directly to players;
5 2) selling the Season 5 Battle Pass that contains the Swipe It emote; 3)
6 advertising the Swipe It emote to attract additional players, including
7 2 Milly's fans or those persons familiar with the Milly Rock to play
8 Fortnite and make in-game purchases; 4) staying relevant to its current
9 players to incentivize those players to continue playing Fortnite; 5)
10 impliedly representing that Ferguson consented to Epic's use of his
11 likeness; 6) erroneously cause the association of the Swipe It with the
12 Milly Rock; 7) creating the false impression that 2 Milly endorsed
13 Fortnite; and 8) inducing and/or contributing to Fortnite players'
14 avatars performing the Milly Rock dance.

15 70. As the rapper, 2 Milly, Ferguson exploits his identity by
16 performing at concerts, events and festivals. Ferguson was damaged by
17 Defendants' conduct as he was prevented from reaping the profits of
18 licensing his likeness to Defendants for commercial gain.

19 71. Defendants' conduct caused and will continue to cause
20 confusion and mistake by leading the public to erroneously believe that
21 Ferguson consented to the use of his likeness in the Fortnite game.

22 72. Ferguson is entitled to permanent injunctive relief
23 preventing Defendants, and their officers, agents, and employees, and
24 all related persons from further using his likeness.

25 73. Ferguson is also entitled to recover damages, including any
26 profits obtained by Defendants as a result of the infringements alleged
27 above, in an amount according to proof to be determined at the time of
28 trial.

FOURTH CAUSE OF ACTION

**(For Violation of the Right of Publicity Under Cal. Civ. Code §
3344 Against All Defendants)**

74. Ferguson hereby repeats and realleges the allegations set forth in paragraphs 1 through 73, above, as though fully set forth herein.

75. Through their use of Milly Rock dance as an in-game dance emote that can be purchased, Defendants misappropriated Ferguson's identity. The Swipe it emote depicts Ferguson performing the Milly Rock dance. Upon information and belief, Defendants created the Swipe It emote by capturing and digitally copying Ferguson performing the Milly Rock. Defendants then utilized the digital copy to create code that, if purchased, allows player avatars to perform the Milly Rock dance.

76. Defendants did not seek or obtain Ferguson's authorization or consent for its use of his likeness for the Swipe It emote. Nor have Defendants compensated or credited Ferguson for their use of the Milly Rock.

77. Defendants used Ferguson's likeness to generate significant wealth by: 1) selling the infringing Swipe It emote directly to players; 2) selling the Season 5 Battle Pass that contains the Swipe It emote; 3) advertising the Swipe It emote to attract additional players, including 2 Milly's fans or those persons familiar with the Milly Rock to play Fortnite and make in-game purchases; 4) staying relevant to its current players to incentivize those players to continue playing Fortnite; 5) impliedly representing that Ferguson consented to Epic's use of his likeness; 6) erroneously cause the association of the Swipe It with the Milly Rock; 7) creating the false impression that 2 Milly endorsed

1 Fortnite; and 8) inducing and/or contributing to Fortnite players'
2 avatars performing the Milly Rock dance.

3 78. As the rapper, 2 Milly, Ferguson exploits his identity by
4 performing at concerts, events and festivals. Ferguson was damaged by
5 Defendants' conduct as he was prevented from reaping the profits of
6 licensing his likeness to Defendants for commercial gain.

7 79. Defendants' conduct caused and will continue to cause
8 confusion and mistake by leading the public to erroneously believe that
9 Ferguson consented to the use of his likeness in the Fortnite game.

10 80. Ferguson is entitled to permanent injunctive relief
11 preventing Defendants, and their officers, agents, and employees, and
12 all related persons from further using his likeness.

13 81. Ferguson is also entitled to recover damages, including any
14 profits obtained by Defendants as a result of the infringements alleged
15 above, in an amount according to proof to be determined at the time of
16 trial.

17 **FIFTH CAUSE OF ACTION**

18 **(Unfair Competition Under Cal. Bus. & Prof. Code § 17200)**

19 82. Ferguson hereby repeats and realleges the allegations set
20 forth in paragraphs 1 through 81, above, as though fully set forth
21 herein.

22 83. By misappropriating Ferguson's copyright and likeness
23 through the improper use of the Milly Rock dance, Defendants have
24 engaged in business acts or practices that constitute unfair competition
25 in violation of Cal. Bus. & Prof. Code. § 17200.

26 84. As a result of Defendants' violations, Defendants have
27 unjustly enriched themselves by: 1) selling the infringing Swipe It
28 emote directly to players; 2) selling the Season 5 Battle Pass that

1 contains the Swipe It emote; 3) advertising the Swipe It emote to attract
2 additional players, including 2 Milly's fans or those persons familiar
3 with the Milly Rock to play Fortnite and make in-game purchases; 4)
4 staying relevant to its current players to incentivize those players to
5 continue playing Fortnite; 5) impliedly representing that Ferguson
6 consented to Epic's use of the Milly Rock and his likeness; 6) erroneously
7 cause the association of the Swipe It with the Milly Rock; 7) creating
8 the false impression that 2 Milly endorsed Fortnite; and 8) inducing
9 and/or contributing to Fortnite players' avatars performing the Milly
10 Rock dance.

11 85. As a result of Defendants' conduct, Ferguson has been
12 damaged by being precluded from receiving his rightful share of the
13 profits from selling or licensing his exclusive copyright in the Milly Rock
14 dance.

15 86. Moreover, Ferguson was damaged by Defendants' conduct as
16 he was prevented from reaping the profits of licensing his likeness to
17 Defendants for commercial gain.

18 87. Ferguson is entitled to permanent injunctive relief
19 preventing Defendants, and their officers, agents, and employees, and
20 all related persons from further using his likeness.

21 88. Ferguson is also entitled to recover damages, including any
22 profits obtained by Defendants as a result of the infringements alleged
23 above, in an amount according to proof to be determined at the time of
24 trial.

1 **SIXTH CAUSE OF ACTION**

2 **(Unfair Competition Under 15 U.S.C. § 1125(a))**

3 89. Ferguson hereby repeats and realleges the allegations set
4 forth in paragraphs 1 through 88, above, as though fully set forth
5 herein.

6 90. Since releasing the Milly Rock music video in 2014,
7 Ferguson's Milly Rock dance has exploded in popularity. The dance,
8 unanimously identified by the name, Milly Rock, is distinct and
9 immediately recognizable by the rapid and successive swiping motion
10 of the arms in front of the body.

11 91. As the dance's creator, Ferguson is the owner of all the
12 rights, title and interest to the property rights embodied in the Milly
13 Rock name and dance.

14 92. Although clearly depicting the Milly Rock, Defendants
15 falsely and intentionally labeled the dance "Swipe It" in order to "pass
16 off" Plaintiff's Milly Rock dance as their own work in violation of the
17 Lanham Act, 15 U.S.C. § 1125(a).

18 93. Defendant's copying and relabeling of Ferguson's Milly
19 Rock dance has caused confusion, deception, and mistake by the
20 creation of the false and misleading impression that Defendants were
21 the creators of the Milly Rock dance.

22 94. As a result of Defendants' conduct, Ferguson is damaged by
23 Defendants' exploitation of his name and likeness through 1) selling the
24 infringing Milly Rock emotes directly to players; 2) selling NBA 2K18
25 and NBA 2K19 that contain the Milly Rock emotes; 3) advertising the
26 Milly Rock emotes to attract additional players, including 2 Milly's fans
27 or those persons familiar with the Milly Rock to play NBA 2K18 and
28 NBA 2K19 and make in-game purchases; 4) keeping the franchise

1 relevant to its players to incentivize those players to continue
 2 purchasing the 2K games; 5) impliedly representing that Ferguson
 3 consented to Defendants' use of his likeness; 6) erroneously causing the
 4 association of NBA 2K18 and NBA 2K19 with the Milly Rock; 7)
 5 creating the false impression that Ferguson endorsed NBA 2K18 and
 6 NBA 2K19; and 8) inducing and/or contributing to NBA 2K18 and NBA
 7 2K19 players' characters performing the Milly Rock dance.

8 95. As a result of Defendants' conduct, Ferguson has been
 9 damaged by being precluded from receiving his rightful share of the
 10 profits from selling or licensing the Milly Rock name and dance.

11 96. Moreover, Ferguson was damaged by Defendants' conduct as
 12 he was prevented from reaping the profits of licensing the Milly Rock
 13 name and dance to Defendants for commercial gain.

14 97. Ferguson is entitled to permanent injunctive relief
 15 preventing Defendants, and their officers, agents, and employees, and
 16 all related persons from further using the Milly Rock name and dance.

17 98. Ferguson is also entitled to recover damages, including
 18 attorney's fees, as a result of the infringements alleged above, in an
 19 amount according to proof to be determined at the time of trial.

20 **PRAYER FOR RELIEF**

21 **As to the First Cause of Action:**

- 22 1. For an order restraining Defendants from using, selling, or
 23 displaying Ferguson's copyright in its Fortnite game;
- 24 2. For an award of damages according to proof;
- 25 3. For punitive and/or exemplary damages;
- 26 4. For attorney's fees and costs;

As to the Second Cause of Action:

5. For an order restraining Defendants from using, selling, or displaying Ferguson's copyright in its Fortnite game;

2. For an award of damages according to proof;

3. For punitive and/or exemplary damages;

4. For attorney's fees and costs;

As to the Third Cause of Action:

7. For an order restraining Defendants from using, selling, or displaying Ferguson's likeness in its Fortnite game;

8. For an award of damages according to proof;

As to the Fourth Cause of Action:

10. For an order restraining Defendants from using, selling, or displaying Ferguson's likeness in its Fortnite game;

11. For an award of damages according to proof;

12. For punitive and/or exemplary damages;

As to the Fifth Cause of Action:

14. For an order restraining Defendants from using, selling, or displaying Ferguson's copyright and likeness in its Fortnite game;

15. For an award of damages according to proof;

16. For punitive and/or exemplary damages;

17. For attorney's fees and costs;

As to the Sixth Cause of Action:

18. For an order restraining Defendants from using, selling, or displaying Ferguson's copyright and likeness in its Fortnite game;

19. For an award of damages according to proof;

20. For punitive and/or exemplary damages; and

21. For attorney's fees and costs;

As to All Causes of Action:

22. For costs of suit; and

23. For such other and further relief as the Court may deem proper.

Dated: December 17, 2018

Respectfully Submitted,

**Pierce Bainbridge Beck Price &
Hecht LLP**

By: /s/ Carolynn Kyungwon Beck
Carolynn Kyungwon Beck
*Attorneys for Plaintiff Terrence
Ferguson*

JURY TRIAL

Plaintiff Terrence Ferguson requests a trial by jury on all issues to which it is entitled a jury.

Dated: December 17, 2018

Respectfully Submitted,

**Pierce Bainbridge Beck Price &
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